THE PROPOSED NEW BRUNSWICK *JUDGMENT ENFORCEMENT ACT*

QUESTIONS AND COMMENTS

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1. Pre-Judgment Remedies. The draft NBJEA proposes a system of pre-judgment remedies that is substantially a codification of the current state of the law under R.40.03, the Mareva injunction. Codification has advantages, in that it specifically sets out the state of the law. It also has disadvantages, in that it fixes the law and may impede future common-law development. Another factor to be borne in mind is that though the draft would place in the NBJEA the procedure relating to interim preservation of assets, it would leave other elements of pre-judgment relief to be dealt with under the Rules of Court.

To assist in deciding whether the proposals in the NBJEA should be adopted, it would be helpful to have information about current experience under the Rules of Court. It may be that the question of 'to codify or not to codify' is ultimately to be resolved at the level of general legislative philosophy. On the other hand, there may be solid practical arguments on one side or the other, in which case we would like to know.

2. Judgment to Bind all Property. One feature of the proposed NBJEA is that a registered judgment will bind all present and after-acquired property of the judgment debtor, and "property" is broadly defined with the intention of capturing virtually everything which may have monetary value. One advantage of this is that the judgment creditor can secure his/her position from an early stage, and it is thought that this may be of benefit to the judgment debtor as well, since the judgment creditor who has security may be less anxious to proceed to execution than one who, as under the existing law, only gains security once

execution proceedings have begun. The existing unproclaimed amendments to the Creditors Relief Act also adopt the principle that registration of a judgment in the PPR will bind the present and after-acquired personal property of the judgment creditor, though this only extends to the kinds of property that are currently exigible or attachable under the Act. A comparable position exists in relation to land under the Memorials and Executions Act. The draft NBJEA combines these two elements by stating that registration in the PPR will bind all property, both real and personal.

It is anticipated that judgment creditors will register notices of judgment virtually automatically, and as early as practicable, thus binding the judgment debtor's present and after-acquired assets until the judgment is paid. The implications of this should be carefully considered. It will affect not only the judgment debtor's ability to deal with the property but also his/her ability to obtain credit. The draft NBJEA contains provisions designed to allow reasonable dealings with the property to continue, but subject to those provisions, the binding of the judgment debtor's property would have wide-ranging affects.

Under the draft NBJEA, it would be possible, for example, that the entire assets of a large commercial organization would be bound for a period of time by the registration of even a small judgment. Or perhaps there may be some organizations that are involved in litigation regularly -- a tort action here, a breach of contract there, a claim for unfair dismissal now and then -- which might conceivably find their assets being virtually permanently affected by a series of registered judgments; each individual judgment might

be paid within a reasonable period, but at any particular point in time, there might well be at least one judgment outstanding. Another possibility is that individuals or small businesses might be inconvenienced by a judgment which they were duly paying off by instalments, but which bound all their assets in the meantime. (One point to note, though, is that under the present proposal, support orders are not considered to be 'money judgments', unless and until a judgment for arrears of support payments is entered. If the support order itself were considered a 'money judgment' it would provide another example of a situation in which a judgment creditor's entire property could be bound for long periods of time, since the obligation to pay support may often last for many years.)

Are possibilities such as these a cause for concern? The comparable position that has existed in relation to land for many years does not appear to have been problematic. And if, conversely, the expansion of this principle to include personal property does cause difficulties, perhaps that is no bad thing. The assumption on which the draft NBJEA proceeds is, in part, that if the all-embracing nature of the binding of property by a notice of judgment is indeed a substantial problem for the judgment debtor, the debtor will have that much more incentive to pay the debt, and in some circumstances may make arrangements by which the judgment creditor's statutory security will be converted into something that the debtor finds more manageable -- e.g. the debtor might mortgage specific property in order to pay the debt and remove the statutory security, thus freeing his/her other property from the effect of the Act. If, on the other hand, the judgment debtor cannot

make those alternative arrangements, perhaps it is just as well if other potential creditors are, in effect, 'warned off' by the notice of judgment registered on the PPR.

3. Subsequent Owners. Another aspect of the binding of property that requires attention is the effect of a registered judgment on subsequent owners. The general theory of the Act is that registration binds the property, and that, subject to specific exceptions for purchases in the course of business and purchases of consumer goods costing less than $1,000, the property is bound absolutely, into whatever hands it may come, and whether or not it would have been possible to trace the property back to the original judgment debtor by a search in the PPR. In this the draft NBJEA is modelled on the PPSA. The result is that being unaware of the existence of a registered judgment does not protect subsequent owners; their protection comes instead through (a) the specific exceptions in Part 3 of the NBJEA, and (b) the possibility of obtaining compensation from the assurance fund that the draft proposes.

This general background places a heavy burden on the exceptions to provide proper protection for the third parties. Careful thought should be given to whether they do so. An alternative approach would be to say that the third party was not bound by interests which he or she did not know of and could not have discovered by searching in the PPR (in which event the assurance fund might compensate the judgment creditor rather than the third party). The latter approach would be the familiar common-law approach of protecting the

purchaser for value without notice. The former, however, which preserves the secured interest unless a statutory exception applies, is the pattern of the PPSA.

Whatever approach is adopted, and whether or not an assurance fund is established, it is likely that, in theory, there would be a chain of legal claims available leading back to whoever was substantially at fault in not searching the PPR. In practice, however, that chain might rarely be worth pursuing.

4. Limitation Period. The draft NBJEA proposes that the limitation period for the enforcement of judgments should be reduced to 10 years from the date of the judgment. A single 10-year registration would cover this period, rather than the existing five-year instalments under the Memorials and Executions Act. The judgment creditor would not be able to extend this 10-year period by suing on the judgment before the 10-year period expires.

It would be helpful to know whether the shorter limitation period and the removal of the possibility of reviving a judgment by bringing a new action based on it would cause any practical difficulties. How frequently nowadays does recovery under a judgment take place more than ten years after the judgment?

5. *Pro rata* Sharing. Under the Creditors Relief Act, *pro rata* sharing of the proceeds of executions has been part of the law of New Brunswick for a long time; the draft NBJEA

suggests that the principle should be retained, though with modifications. Arguments have been made elsewhere, however, for the idea that sharing of the proceeds of executions is inappropriate: that if the judgment debtor is solvent, *pro rata* sharing is unnecessary since each judgment creditor can execute and obtain payment in full, while if the debtor is insolvent, sharing should be dealt with under bankruptcy legislation rather than the Creditors Relief Act. Federal bankruptcy legislation did not exist at the time when the Creditors Relief Act was put in place. The alternatives here deserve serious attention.

What is said in favour of *pro rata* sharing, whether under the Creditors Relief Act or the draft NBJEA, is that it avoids the 'rush for judgment' that might ensue if executions law were simply a matter of 'first come, first served'. It also respects the principle of 'fair shares' as between competing judgment creditors, and reduces the need for bankruptcy proceedings, which, whatever their attractions from the point of view of the debtor (who may obtain a discharge) or of other unsecured creditors who do not have judgments but wish to take *pro rata* shares of the judgment debtor's assets, are costly and complicated and not an effective way for judgment creditors to enforce their rights. The NBJEA is, of course, legislation that specifically deals with the enforcement of judgments; nothing in it prevents the debtor or any judgment creditor or other creditors from taking action under bankruptcy legislation if they choose.

Two main issues arise in relation to *pro rata* sharing. First, is it right to deal with the matter as being solely a question of the respective rights of judgment creditors as against

one another? In theory the answer seems to be 'yes', since nothing in the draft NBJEA affects anybody's rights to secure a sharing of property under bankruptcy law; all the Act does is say that registered judgment creditors have to share *pro rata* the proceeds of any execution that any of them brings. Realistically speaking, however, does the same answer hold true? Since shares of the proceeds of an execution will only be called for when the whole of the debtor's exigible assets have been exhausted and are still not enough to satisfy the outstanding judgments in full, the reality would seem to be that once the proceeds of the execution are distributed *pro rata* the judgment debtor has nothing left to be shared in bankruptcy. In that case what *pro rata* sharing becomes is not merely a matter of sharing between judgment creditors but a means by which one group of unsecured creditors -- those who can get judgments quickly enough -- can gain the advantage of quick and easy sharing under the NBJEA, as against the slower and more costly bankruptcy proceedings that will be open to other unsecured creditors.

It must be pointed out, also, that the draft NBJEA would remove what is arguably, in theory, a major attraction of the Creditors Relief Act as a safety valve against the 'rush for judgment' and as a method for achieving fairness among creditors -- namely, the ability for creditors who have not yet obtained judgments to submit claims, with the claims being adjudicated subsequently if they are disputed. Under the Creditors Relief Act, everybody to whom the judgment debtor owes a debt has a limited opportunity to invoke the Act once the sheriff has seized a judgment debtor's property. Under the NBJEA, by contrast, *pro rata* sharing is limited to judgment creditors who have registered their judgments before the

sheriff distributes the proceeds of an execution. The draft NBJEA thus continues to place a premium on who obtains a judgment and when, albeit less dramatically so than 'first come, first served' does.

All of this, though, must be set against the fact that the Office of the Sheriff advises that it is extremely rare for sharing under the Creditors Relief Act to include creditors who do not have judgments and invoke the certificate procedure under the Act, so the theoretical availability of the Act to a wide range of creditors, with or without judgments, may be of little practical importance. This, then, leads to the second of the main issues that arise in relation to *pro rata* sharing. Even if it is right to deal with it as being exclusively a matter relating to the rights of judgment creditors as against each other, are the advantages sufficient to outweigh the disadvantages? To decide this one has to consider the scheme of collective enforcement through which the draft NBJEA implements the principle of *pro rata* sharing.

6. Collective Enforcement. As the Summary states, collective enforcement is the logical extension of *pro rata* sharing. Collective enforcement starts with the idea that all registered judgment creditors, whenever their judgments are obtained and registered, rank equally in terms of priority. The proposal is, then, that if a judgment creditor executes, he/she must do so on behalf of all registered judgment creditors, and must attempt to realize sufficient proceeds to cover all of their judgment debts; the proceeds realized will be shared among them *pro rata*. By extension, if it should happen that a consensual security interest is

registered between two judgment debts (e.g., in order of registration, judgment 1, charge, judgment 2), then if either judgment creditor executes, the execution will lead to the discharge of the charge that intervenes between the two judgments, and to the payment of the debt it secures. The position can be contrasted with that of the exercise of, say, a power of sale under a third mortgage. In that case the sale by the third mortgage will be subject to the previously registered charges, so the holder of the second registered interest would not be affected by action taken by the third.

The logical connection between *pro rata* sharing and collective enforcement is this: if two judgment creditors have registered their judgments and are obliged to share the proceeds of their execution *pro rata*, it is only by enforcing 100% of both judgments that either judgment creditor can recover 100% of his/her own. A creditor who only attempted to recover his/her own judgment, and was then obliged to share the proceeds *pro rata*, could not recover the full amount due.

The disadvantage of collective enforcement is that it could complicate issues where different creditors have different interests; one may be prepared to wait and execute at a later time, another may wish to do so immediately. A degree of flexibility could be attained by voluntary arrangements made outside the scope of the Act -- creditors might make arrangements under which one would agree not to initiate execution, etc. -- and the Act does provide that one creditor may attempt to obtain a stay of an execution by another, but the principle of collective enforcement in the Act forces all registered judgment creditors

into a legal relationship. If one or more of them did not like what another was doing -- and each would be equally entitled to initiate the execution procedure -- they would have to find some way or another of working their way out of the framework of collective enforcement that the Act creates.

Collective enforcement might well prove particularly complicated in cases in which long-term enforcement measures such as instalment orders had been implemented. If different judgment creditors became involved over the course of time the proportions of the *pro rata* shares would change, and instalment arrangements that had seemed satisfactory to judgment creditor 1 when they were put in place, and might have persuaded him/her not to press for more aggressive enforcement measures at the time, might become highly unsatisfactory once other creditors also became entitled to share. The proposal in the draft also preserves the slight oddity that exists under the present Creditors Relief Act that, by allowing the participation of judgment creditors who register after execution commences but before distribution is made, an execution which is designed to recoup 100% of judgments 1, 2 and 3 may be inadequate to recover the subsequently registered judgment 4 as well, thus leading to the need for further execution proceedings (assuming the judgment debtor has further property). What this amounts to is that executions are potentially being levied for the benefit of persons unknown and for amounts that may change by the time the sheriff realizes on the property. The ability of judgment creditors to pursue only their own interests becomes circumscribed. On the other hand, if late registrants are not allowed to share, the result merely recreates something similar to the 'first come, first served' principle that *pro*

rata sharing was designed to counteract; it would mean that any judgment creditor could, by issuing an execution, effectively close the class amongst whom the proceeds had to be shared.

Clearly, if *pro rata* sharing were not one of the principles of the NBJEA, there would be no need for a system of collective enforcement. There might then be a need to make some modification to the 'first come, first served' rule to moderate the potentially random effects of who happened to get a judgment registered first, but the starting-point for the legislation would be that judgment creditors were acting on their own account, rather than being obliged to act for others. If, on the other hand, as the draft NBJEA proposes, there is to be *pro rata* sharing, what needs to be decided is how far the scheme should go. What the draft NBJEA contains is, essentially, a scheme for mandatory sharing, among all judgment creditors who have registered judgments by the time the sheriff distributes the proceeds. In contrast to this, sharing under the Creditors Relief Act is open to all creditors who choose to apply for it at a particular stage in a judgment creditor's enforcement procedures, though they may have to prove their claims after submitting them.

At present all of the options described above -- NBJEA, something more like the Creditors Relief Act and a 'no provincial sharing' approach -- are open. Other suggestions would also be welcome.

7. Examination of Judgment Debtor. The process in the draft NBJEA is based on the procedure in the Rules of Court; the provisions of the Arrest and Examinations Act for an examination before the Clerk of the Court would be repealed. Practitioners presumably have experience of both procedures, and it would be useful to have their comments on the merits of one as against the other as methods of establishing the means of a judgment debtor. Comments on the efficacy of the proposed questionnaire, which is likely to be similar in substance to the Financial Statement used in the Family Division, would also be useful.

8. Enforcement Mechanisms. Comments of all sorts on the nature and details of the proposed enforcement mechanisms would be appreciated. Among the points that may be worthy of discussion are:

- whether the draft NBJEA is right in saying that the judgment creditor should determine what property is to be taken in execution, unless the judgment debtor can satisfy the sheriff that something else should be taken instead;
- whether the exemptions are appropriate, particularly those relating to shelter, income and RRSP's;
- whether, as the NBJEA proposes, land should be exigible without the need to exhaust personal property first, but with a six-month waiting period before land can be sold;
- whether the procedures for sale of land and other property are satisfactory;

- whether the procedure for garnishment of employment earnings is reasonable;
- whether other remedies beyond those mentioned could be devised -- for example a power simply to vest property in the judgment creditor without an intervening sale.

There are doubtless many other points of substance and of detail that deserve comment. By listing some, we would not want to discourage people from commenting on others.

9. Powers and Discretions of Enforcement Officer. Though the draft NBJEA starts with the idea that it is up to the judgment creditor to determine the nature of the enforcement action that will be taken against the judgment debtor, it also allows the Enforcement Officer various discretionary powers. These discretionary powers -- among them the power to grant a stay of enforcement -- are designed to ensure that the system can maintain a balance between the interests of debtors and creditors, and are all subject to review by the court. Do the proposals in the draft strike the right balance? If not, in what ways do they err?

10. Excusing the Debtor from Further Performance. A question that the draft NBJEA does not address is whether the legislation should contain a provision under which debtors against whom execution has already been levied might apply for relief against further execution in relation to the same judgment debt. Under the draft NBJEA, as under the existing law, if execution does not result in full satisfaction of a judgment debt, the balance remains due, and further executions may be taken in the future if the debtor obtains further

assets. Should there come a point at which a debtor who has made every reasonable effort to pay the judgment should be released from further performance? The argument in favour is that this is only fair. The argument against is that it is a matter for bankruptcy law.

11. Other Comments

Please feel free to comment on any other aspect of the draft NBJEA as well.